

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

JENNIFER N. FORSHEY, D.M.D., M.D.,

Plaintiff,

v.

SOMS, Inc., P.S., a Washington corporation;  
ROBERT TODD ERICKSON, DDS, and  
ANNE ERICKSON, and their marital  
community,

Defendants.

SOMS, Inc., P.S., a Washington corporation;  
ROBERT TODD ERICKSON, DDS, and  
ANNE ERICKSON, and their marital  
community,

Counter Claimants,

v.

JENNIFER N. FORSHEY, D.M.D., M.D.,

Counter Defendant.

CASE NO. C06-5335RJB

ORDER (1) GRANTING IN  
PART AND DENYING IN PART  
PLAINTIFF'S MOTION FOR  
SUMMARY JUDGMENT ON  
CONTRACT CLAIMS, (2)  
GRANTING IN PART AND  
DENYING IN PART  
PLAINTIFF'S MOTION FOR  
SUMMARY JUDGMENT ON  
COUNTERCLAIMS, AND (3)  
GRANTING AND DENYING  
EVIDENTIARY MOTIONS TO  
STRIKE

This matter comes before the Court on the Plaintiff's Motion for Summary Judgment on  
Contract Claims (Dkt. 92), the Plaintiff's Motion for Summary Judgment on Counterclaims (Dkt.

93), and the Evidentiary Motions to Strike contained in the reply (Dkt. 159). The Court has considered the pleadings filed in support of and in opposition to the motions and the file herein.

### **I. FACTUAL AND PROCEDURAL BACKGROUND**

Plaintiff Jennifer N. Forshey is an oral surgeon who was hired by SOMS, Inc. P.S. ("SOMS") in March of 2004 under a one-year employment contract. Dkt. 94, Exh. A at 2. Dr. Forshey's employment with SOMS was terminated on August 19, 2004. Dkt. 151 at 21. The complaint alleges that the termination stemmed from Dr. Forshey's opposition to Dr. Erickson permitting Michael Serrienne to administer anesthetics when he was in fact not licensed to do so. Dkt. 1 at 5. Dr. Forshey alleges that her termination constitutes wrongful discharge in violation of public policy and breach of employment contract. *Id.* at 7. Intermountain Employment Solutions, Inc. was dismissed. *See* Dkt. 45.

Two motions for summary judgment are currently pending before the Court. Dkt. 92; Dkt. 93. The defendants filed a joint response to both motions. Dkt. 151. Therefore, the Court will address both motions in this Order.

### **II. SUMMARY JUDGMENT STANDARD**

Summary judgment is proper only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an essential element of a claim in the case on which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1985). There is no genuine issue of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find for the non moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (nonmoving party must present specific, significant probative evidence, not simply "some metaphysical doubt."). *See also* Fed. R. Civ. P. 56(e). Conversely, a genuine dispute over a material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 253 (1986); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors*

1 *Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987).

2       The determination of the existence of a material fact is often a close question. The court  
3 must consider the substantive evidentiary burden that the nonmoving party must meet at trial –  
4 e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254; *T.W. Elec.*  
5 *Serv., Inc.*, 809 F.2d at 630. The court must resolve any factual issues of controversy in favor of  
6 the nonmoving party only when the facts specifically attested by that party contradict facts  
7 specifically attested by the moving party. The nonmoving party may not merely state that it will  
8 discredit the moving party's evidence at trial, in the hopes that evidence can be developed at trial  
9 to support the claim. *T.W. Elec. Serv., Inc.*, 809 F.2d at 630 (relying on *Anderson*, *supra*).  
10 Conclusory, non specific statements in affidavits are not sufficient, and missing facts will not be  
11 presumed. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888-89 (1990).

### 12                                   **III. DISCUSSION**

13       First, Dr. Forshey moves for summary judgment on her breach of contract claims. Dkt. 92.  
14 Dr. Forshey contends that the defendants violated provisions of the Associate Agreement  
15 governing written notice, termination, and compensation. Dkt. 92. Second, Dr. Forshey moves for  
16 summary judgment on the defendants' counterclaims for breach of contract and tortious  
17 interference with business expectations. Dkt. 93.

#### 18                   **A. BREACH OF CONTRACT**

19       Under the rule of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), "federal courts sitting in  
20 diversity jurisdiction apply state substantive law and federal procedural law." *Gasperini v. Center*  
21 *for Humanities, Inc.*, 518 U.S. 415, 427 (1996). As the Washington Supreme Court has noted,  
22 courts asked to enforce a contract may be called upon to either construct or interpret a contract's  
23 terms. *Berg v. Hudesman*, 115 Wn.2d 657, 663 (1990). Contract construction requires the court  
24 to determine the legal consequences that flow from a contract's terms. *Id.* at 663. Contract  
25 construction is a purely legal question, and is therefore appropriate for resolution at the summary  
26 judgment stage.

27       Contract interpretation requires the court to determine the meaning of a contract term and  
28 the parties' intentions. *Id.* at 663. When interpreting a contract, the contract's ambiguous

language is construed against the party who drafted it or whose attorney prepared it. *See Guy Stickney, Inc. v. Underwood*, 67 Wn.2d 824,827 (1966). The Court's review is generally limited to the contract itself, and parol evidence or extrinsic evidence is not admissible to add to, subtract from, vary, or contradict written contracts that are valid, complete, unambiguous, and not affected by accident, fraud, or mistake. *Berg*, 115 Wn.2d at 670. Washington courts use the "context rule" when interpreting contracts, whereby extrinsic evidence is admissible as to the entire circumstances under which the contract was made, as an aid in ascertaining the parties' intent." *Id.* at 667. Under the context rule, courts may consider parol evidence to interpret the contract as it was written. *Id.* at 669.

Dr. Forshey contends that her termination was a breach of Paragraphs 13 ("Termination of Employment") and 15 ("Notices") of the Associate Agreement and that she is owed a \$6,295.29 bonus under Paragraph 4 ("Compensation") of the Associate Agreement. Dkt. 92 at 9-18.

### 1. "Reasonable Notice" Requirement

Dr. Forshey contends (1) that her termination was for failure to comply with policies and not "for cause"; and (2) that the defendants therefore breached the Associate Agreement by failing to provide her written notice before she was terminated. *See* Dkt. 92 at 20-21. The defendants contend that Dr. Forshey was terminated "for cause" and that such termination does not require written notice. Dkt. 151 at 25.

Paragraph 13 of the Associate Agreement between SOMS and Dr. Forshey governs termination and requires notice for termination for failure to comply with policies:

The Employer shall have the right to terminate this Agreement and the Employee's employment hereunder at any time upon the occurrence of any one or more of the following events: . . . (iv) if the Employee shall, after reasonable notice, continue to fail or refuse to comply with the policies, standards, or regulations of the Employer from time to time established; . . . (viii) for cause . . . .

Dkt. 95, Exh. A at 7-8.

The Associate Agreement may also be terminated by either party upon notice given ninety days before the end of the contract term. Dkt. 95, Exh. A at 2.

Dr. Forshey first contends that her termination cannot properly be characterized as "for cause" because that provision of the contract should not be given legal effect and because her

1 termination did not satisfy the “just cause” standard under Washington law. Rather, Dr. Forshey  
2 urges the Court to analyze her termination under the provision regarding violation of policies and  
3 requiring reasonable notice.

4 Dr. Forshey contends that the “for cause” provision should not be given legal effect  
5 because the specific, enumerated events justifying termination must be applied before the general  
6 “for cause” term when interpreting the contract. Dkt. 92 at 19; *see Diamond B Constructors, Inc.*  
7 *v. Granite Falls School Dist.*, 117 Wn. App. 157, 165 (2003) (“Where the contract provides a  
8 general and a specific term, the specific controls over the general.”). This rule applies only when  
9 there is an ambiguity or conflict. *Graoch Associates No. 5 Ltd. Partnership v. Titan Const. Corp.*,  
10 126 Wn. App. 856, 867 (2005). The Court is not persuaded that the provision allowing  
11 termination for failure to comply with employer policies conflicts with the provision allowing “for  
12 cause” terminations or creates an ambiguity. Dr. Forshey fails to persuade the Court that giving  
13 effect to the “for cause” termination provision would render meaningless the specific and  
14 enumerated justifications for termination.

15 Dr. Forshey next contends that her termination does not comport with the standards of  
16 “just cause” under Washington law. The Associate Agreement does not define “cause.”  
17 Washington Courts have defined “just cause”:

18 “[J]ust cause” is a fair and honest cause or reason, regulated by good faith on the part of  
19 the party exercising the power. We further hold a discharge for “just cause” is one which  
20 is not for any arbitrary, capricious, or illegal reason and which is one based on facts (1)  
21 supported by substantial evidence and (2) reasonably believed by the employer to be true.  
22 *Baldwin v. Sisters of Providence in Washington, Inc.*, 112 Wn.2d 127, 139 (1989). “Just cause”  
23 and “for cause” are different legal standards, and “just cause” affords employees more rights. *See*  
24 *Civil Service Com’n of City of Kelso v. City of Kelso*, 137 Wn.2d 166, 174-76 (1999). Dr.  
25 Forshey offers no legal authority for applying the higher “just cause” standard to the “for cause”  
26 provision in the Associate Agreement.

27 Finally, Dr. Forshey contends that the reason for her termination was failure to comply  
28 with SOMS’s policies, standards, and regulations. The defendants allege several justifications for  
Dr. Forshey’s termination, including the following: Dr. Forshey’s behavior during the last weeks

of her employment (Dkt. 152-2, Exh. 2; Dkt. 156, Exh. 1); Dr. Forshey's breaking of "elevators" used to extract teeth (Dkt. 152-4, Exh. 16 at 19, 24, 28; *see* Dkt. 152-5, Exh. 19 at 3); Dr. Forshey's failure to document whether patients on anti-coagulation therapy had received recent PT/INR tests (*See* Dkt. 152-2, Exh. 1 at 7-8; Dkt. 152-4, Exh. 16 at 26-27); Dr. Forshey's failure to engage in marketing activities on her day off as promised (Dkt. 155 at 2); and downcoding (undercharging) or giving away services (Dkt. 153 at 5). It is not clear whether these justifications for Dr. Forshey's termination relate to "policies, standards or regulations of the Employer from time to time established" and therefore fall under the contract provision requiring notice. Dkt. 95, Exh. A at 7; *see also* Dkt. 151 at 14 (response admitting that no policy manual governed Dr. Forshey's alleged behavioral issues); Dkt. 152-4, Exh. 16 at 26-27 (Dr. Erickson describing PT/INR testing as "protocol"); Dkt. 153 at 5 (giving away care is not in compliance with the procedures of the practice); Dkt. 95, Exh. A at 3 (paragraph 3.2 of the contract requires prior written consent for the performance of surgery or dental services for the benefit of any other person or entity); Dkt. 95, Exh. A at 3 (paragraph 3.3 of the contract governs the performance of "administrative and marketing duties"); Dkt. 95, Exh. A at 6 (paragraph 12.1.1, a "restrictive covenant," prohibits rendering services to any patients of the practice to or for the benefit of the employee or any other person or entity). Because it is not yet clear whether Dr. Forshey's termination was based upon violation of policies, standards, or regulations, the Court cannot yet determine whether Dr. Forshey was entitled to "reasonable notice" prior to her termination. The Plaintiff's Motion for Summary Judgment on Contract Claims should be denied in this respect.

## **2. Bonus Compensation**

The Associate Agreement between SOMS and Dr. Forshey governs compensation:

In consideration of and as full and total compensation for all services, the Employer shall pay to the Employee during the Term a base salary of One Hundred Fifty Thousand Dollars (\$150,000.00) (the "Base Salary"). In addition to the Base Salary, the Employer shall pay the Employee additional compensation (the "Additional Compensation") at the end of each calendar year equal to twenty percent (20%) of all adjusted collections for the calendar year. During calendar year 2004, the \$600,000.00 threshold will be prorated based on the actual number of weeks the Associate works for the Employer in 2004. Base Salary and Additional Compensation shall hereafter be collectively referred to as "Compensation."

Dkt. 95, Exh. A at 3. In 2004, Dr. Forshey worked 24.7 weeks. Dkt. 94 at 2. The collections

1 threshold, prorated to account for the number of weeks Dr. Forshey actually worked, is  
2 \$285,000. *Id.* Dr. Forshey's collections of \$316,476.47 exceeded the prorated collections  
3 threshold by \$31,476.47. *Id.*; Dkt. 107, Exh. N at 3. Dr. Forshey alleges that she is entitled to 20%  
4 of this amount, or \$6,295.29. Dkt. 92 at 9.

5 Dr. Forshey also contends that she is entitled to double damages for the withheld bonus  
6 compensation. RCW 49.52.050(2) makes it a misdemeanor for an employer to "[w]ilfully and  
7 with intent to deprive the employee of any part of his wages, [] pay any employee a lower wage  
8 than the wage such employer is obligated to pay such employee by any statute, ordinance, or  
9 contract." RCW 49.52.050(2). As a civil penalty for such a violation, employers are liable for  
10 "twice the amount of the wages unlawfully rebated or withheld by way of exemplary damages,  
11 together with costs of suit and a reasonable sum for attorney's fees." under RCW 49.52.070. This  
12 statute is construed liberally. *Flower v. T.R.A. Industries, Inc.*, 127 Wn. App. 13, 35 (2005), *rev.*  
13 *denied*, 156 Wn.2d 1030 (2006). By providing for costs and attorney fees, this statute provides an  
14 effective mechanism for recovery even where the wages wrongfully withheld may be small.  
15 *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 159 (1998).

16 The critical determination in a case under RCW 49.52.070 for double damages is whether  
17 the employer's failure to pay wages was "willful." *Id.* There are two instances when an  
18 employer's failure to pay wages is not deemed willful: (1) the employer's failure to pay was  
19 careless or (2) there was a "bona fide" dispute between the employer and the employee regarding  
20 the payment of wages. *Id.* at 160. The question of whether an employer acts "willfully" for  
21 purposes of RCW 49.52.070 is a question of fact but may be decided as a matter of law if there is  
22 no dispute as to the material facts. *Id.*

23 In this case, the response does not address Dr. Forshey's claim that her wages were  
24 willfully withheld in violation of the Associate Agreement. Dr. Forshey's showing is sufficient,  
25 and the wages at issue were earned before the termination. The defendants have therefore failed  
26 to create a genuine issue of material fact. The Court should grant the Plaintiff's Motion for  
27 Summary Judgment on Contract Claims as to the bonus compensation and double damages owed  
28 to Dr. Forshey under the Associate Agreement.



**B. COUNTERCLAIMS**

Dr. Forshey also seeks summary judgment on the defendants' counterclaims for breach of contract and tortious interference with business expectations. Dkt. 93. The basis for the counterclaims is not clear from the defendants' answer. *See* Dkt. 7 at 8.

The plaintiff contends that summary judgment is proper on the counterclaims because the defendants allege no damages to support their claims. *See* Dkt. 93 at 3-7. As support, the defendants offer a letter itemizing only damages associated with alleged downcoding. *See* Dkt. 119, Exh. Z. This evidence suggests that the defendants have not definitively calculated all of the damages associated with their counterclaims but fails to establish that there are no damages associated with the counterclaims.

**1. Breach of Contract**

Dr. Forshey seeks summary judgment on several aspects of the defendants' breach of contract counterclaim, showing that her failure to disclose a malpractice suit naming her as a defendant and delay in acquiring a Washington General Anesthesia permit do not constitute breaches of the Associate Agreement. Dr. Forshey demonstrates that there is no material issue of fact surrounding these aspects of the defendants' breach of contract counterclaim. The defendants fail to respond to this showing, and summary judgment is therefore appropriate on these aspects of the defendants' breach of contract counterclaim.

Dr. Forshey also contends that her allegedly inadequate marketing and undercharging for services do not constitute breaches of the employment contract. As to these aspects of the defendants' breach of contract counterclaim, there are several material issues of fact that must be resolved by the finder of fact at trial, including the true nature and extent of Dr. Forshey's marketing effort and whether Dr. Forshey gave away care or undercharged for care in order to benefit her employer or another entity. The Court should therefore deny the Motion for Summary Judgment on Counterclaims in these respects.

**2. Tortious Interference**

Dr. Forshey also seeks summary judgment on the defendants' counterclaim for tortious interference with business expectations. Dkt. 93 at 12. A claim of tortious interference with a



1 contractual relationship or business expectancy has five elements:

2 (1) the existence of a valid contractual relationship or business expectancy; (2) that  
3 defendants had knowledge of that relationship; (3) an intentional interference inducing or  
4 causing a breach or termination of the relationship or expectancy; (4) that defendants  
interfered for an improper purpose or used improper means; and (5) resultant damage.

5 *Pacific Northwest Shooting Park Ass'n v. City of Sequim*, 158 Wn.2d 342, 351 (2006). Dr.

6 Forshey cites an excerpt of Defendant Anne Erickson's deposition alleging that referrals to SOMS  
7 ceased after Dr. Forshey's termination and that Dr. Forshey was contacting dentists and asking  
8 them to write letters on her behalf. *See* Dkt. 146, Exh. SS at 35-36. These vague allegations do  
9 not create a genuine issue of material fact for trial. The defendants' response does not address this  
10 portion of the Motion for Summary Judgment on Counterclaims, and the motion should therefore  
11 be granted as to the defendants' counterclaim for tortious interference with business  
12 expectations.

### 13 **C. DISCOVERY ISSUES**

14 Dr. Forshey alleges that the defendants' discovery has been inadequate in several respects.  
15 *See, e.g.*, Dkt. 93 at 1-3, 10-12, 14-15. The deadlines for discovery and motions concerning  
16 discovery have passed, and the timeliness of the defendants' discovery responses is not properly  
17 before the Court. *See* Dkt. 73. While the plaintiff contends that dismissal or sanctions may be  
18 appropriate, the plaintiff has not moved for such relief. Furthermore, it does not appear that  
19 sanctions or dismissal is warranted.

### 20 **D. MOTION TO STRIKE**

21 The plaintiff moves to strike several portions of the record. As explained in more detail  
22 below, the Court should grant and deny the Evidentiary Motions to Strike (Dkt. 159) solely for  
23 purposes of deciding the pending Motions for Summary Judgment and without prejudice to the  
24 parties' use of the stricken evidence at trial. The Court has not considered the stricken materials in  
25 deciding the Motions for Summary Judgment.

26 First, the plaintiff moves to strike Exhibit 29 to the Meade declaration as an unsworn  
27 opinion lacking foundation. Dkt. 159 at 10. Dr. Forshey contends that the Court should not  
28 consider this evidence expert testimony because it was compiled by Dr. Erickson, who has not

1 been identified as an expert. *Id.* Dr. Forshey further contends that this evidence constitutes  
2 hearsay. *Id.* at 12. This document is a spreadsheet listing Dr. Erickson's notes as to the  
3 inadequacy of Dr. Forshey's charts. *See* Dkt. 152-7, Exh. 29 at 26. To the extent that the  
4 spreadsheet offers Dr. Erickson's opinions as to the sufficiency of the care provided, such opinion  
5 evidence from a lay witness is inappropriate under Federal Rule of Evidence 701. Fed. R. Evid.  
6 701(c) ("If the witness is not testifying as an expert, the witness' testimony in the form of  
7 opinions or inferences is limited to those . . . not based on scientific, technical, or other specialized  
8 knowledge . . ."); Dkt. 158 at 2 (Dr. Erickson not disclosed as a witness). To the extent that the  
9 spreadsheet merely summarizes the contents of patients' charts, the evidence is inadmissible  
10 hearsay under Federal Rules of Evidence 802 and 801(c). The Motion to Strike should be granted  
11 as to Exhibit 29.

12 Second, the plaintiff seeks to strike Exhibit 2 to the Meade declaration as conclusory and  
13 inadmissible hearsay. Dkt. 159 at 10. This exhibit is a declaration from Molly (Genie) Morgan.  
14 Dkt. 152-2, Exh. 2 at 24. Dr. Forshey seeks to strike statements regarding discussions with Ruth  
15 Sheppard and Anne Erickson. Dkt. 159 at 10. The motion does not specify the specific statements  
16 to be stricken, and the Court is therefore unable to determine whether such statements constitute  
17 hearsay or whether an exception applies. The Motion to Strike should be denied as to Exhibit 2.

18 Third, the plaintiff moves to strike a statement from the Sweeten declaration, which is  
19 Exhibit 5 to the Meade declaration, because the witness is not available for trial and cannot be  
20 deposed, because the Ms. Sweeten's contact information was not supplied, and because the  
21 statement is conclusory and lacks foundation. Dkt. 159 at 10; Dkt. 158 at 3. The offending  
22 statement reads as follows: "On Thursday, August 19, again during the morning huddle with other  
23 staff present, Dr. Forshey proceeded to become belligerent and extremely adversarial regarding  
24 the decision to put her in the Tacoma office where she would get more referrals based on past  
25 history." Dkt. 152-3, Exh. 5 at 2. The declaration does not specify whether Ms. Sweeten was  
26 present at the morning huddle Thursday, August 19 or whether Ms. Sweeten viewed the allegedly  
27 belligerent and adversarial behavior. The Motion to Strike should therefore be granted as to this  
28 statement.

1 Fourth, the plaintiff moves to strike the last sentence of the Flint declaration as opinion  
2 testimony because Jennifer Flint is not qualified as an expert and was not disclosed as an expert.  
3 Dkt. 159 at 11. The statement is as follows: “It is my belief that her [Dr. Forshey’s] detrimental  
4 behavioral and unprofessional attributes outweighed her value to the practice and thus, her  
5 employment with the practice evolved into a liability to its continued success.” Dkt. 152-3, Exh. 8  
6 at 11. In the preceding sentence, Jennifer Flint states that she is a “marketing professional.” *Id.*  
7 The Court is not persuaded that the success of a medical or dental practice is necessarily within  
8 the realm of scientific, technical, or other specialized knowledge such that a lay witness is barred  
9 from opining on the subject. The Motion to Strike should be denied in this respect.

10 Fifth, the plaintiff moves to strike certain lines of the Alexander deposition. Dkt. 159 at  
11 11. Specifically, the plaintiff seeks to strike Jennifer Alexander’s responses on page 181 as not  
12 responsive to the question posted. *Id.* The plaintiff failed to object at the time of the deposition,  
13 and the objection is therefore waived. *See* Fed. R. Civ. P. 32(d)(3) (Objection to the relevancy or  
14 materiality of testimony is not waived for failure to object during the taking of a deposition unless  
15 the ground of the objection is one that could have been addressed at the time.). The plaintiff also  
16 seeks to strike statements on page 363 regarding how much time Dr. Forshey spent on drafting an  
17 email as compared to time she spent marketing, contending that such statements are conclusory or  
18 speculative. Dkt. 159 at 11. Jennifer Alexander’s statement reflects her feelings and perceptions as  
19 to Dr. Forshey’s amount of time and should not be excluded as conclusory or speculative. *See*  
20 Dkt. 152-3, Exh. 9 at 15 (“I felt that, and I specifically remember saying this to a colleague, that if  
21 she had spent this much time marketing as she had writing this email, she wouldn’t have needed  
22 to.”). Dr. Forshey also seeks to strike Jennifer Alexander’s opinion as to whether Dr. Forshey’s  
23 professed marketing efforts lead to a typical or reasonable amount of business for the practice.  
24 Dkt. 159 at 11. Such opinion testimony concerns specialized knowledge and is inappropriate from  
25 a lay witness. *See* Fed. R. Evid. 702. Dr. Forshey’s final objection to Jennifer Alexander’s  
26 deposition testimony is that certain pages lack foundation regarding relevant comparators and  
27 contain irrelevant evidence in so far as they express an opinion as to whether Dr. Forshey received  
28 adequate notice of termination. Dkt. 159 at 11. It is unclear to the Court which specific

1 statements Dr. Forshey seeks to strike on pages 380-381, and the Motion to Strike should  
2 therefore be denied in this respect.

3 Sixth, Dr. Forshey moves to strike Exhibit 10 to the Meade declaration as lacking in  
4 foundation and inadmissible hearsay. Exhibit 10 is apparently an email exchange between Jennifer  
5 Alexander and Jennifer Flint. *See* Dkt. 152-3, Exh. 10 at 23. The foundation for this document is  
6 unclear, and it should therefore be stricken.

7 Seventh, the plaintiff moves to strike portions of the deposition of Mario Parisio. When  
8 asked whether he gave the defendants an opinion as to whether there was cause to terminate Dr.  
9 Forshey, Mr. Parisio stated that he told the plaintiffs that he believed there was cause to terminate  
10 Dr. Forshey. Dkt. 152-3, Exh. 13 at 38-39. This statement was a statement of fact as to what Mr.  
11 Parisio said. While it contains an opinion, it need not be stricken under Federal Rule of Evidence  
12 702.

13 Eighth, the plaintiff moves to strike portions of the Ornburn deposition in which Angela  
14 Ornburn states that she would expect her employer to be upset with her if she were to use  
15 profanity against her employer. Dkt. 159 at 11; *see* Dkt. 152-4, Exh. 14 at 7. This witness'  
16 opinion as to how her employer, who is not a party to this case, might react if the witness were to  
17 behave as Dr. Forshey allegedly behaved is not relevant and does not constitute proper lay witness  
18 testimony. The Motion to Strike should be granted in this respect.

19 Ninth, the plaintiff moves to strike Exhibit 17 to the Meade declaration. Exhibit 17 is  
20 apparently Dr. Erickson's notes of a conversation he had with Dr. Forshey on August 13, 2004.  
21 *See* Dkt. 152-4, Exh. 17 at 33-34. This document is not signed. The document was apparently  
22 authenticated at page 268 of Dr. Erickson's deposition. *See* Dkt. 152-4, Exh. 16 at 2 (Exhibit  
23 list); Dkt. 152 at 4. To the extent that the document merely restates the conversation between Dr.  
24 Erickson and Dr. Forshey, the document constitutes hearsay and should be stricken.

25 Tenth, the plaintiff moves to strike Exhibit 23 to the Meade declaration. Exhibit 23 is a list  
26 of events that allegedly occurred on August 12, 2004. Dkt. 152-5, Exh. 23 at 11. The document is  
27 not signed. The document was apparently authenticated at page 178 of Ms. Erickson's deposition.  
28 *See* Dkt. 152-4, Exh. 18 at 2 (Exhibit list); Dkt. 152 at 5. This document should be stricken.

Eleventh, the plaintiff moves to strike Exhibit 24 to the Meade declaration as inadmissible hearsay and as lacking in foundation. Dkt. 159 at 11. Exhibit 24 is a letter from Ruth Sheppard to the Washington State Department of Employment Security stating that “the tensions in the office where [sic] extremely stressful.” Dkt. 152-5, Exh. 24 at 13. The defendants have not yet laid a foundation for this statement, and the Motion to Strike should be granted in this respect.

Twelfth, the plaintiff moves to strike the expert report of Dr. Bierne as lacking a foundation because there is no reference to the evidentiary standard of proof for medical opinions. The plaintiff also contends that opinions expressed the expert report conflict with a subsequent appellate case. Dkt. 159 at 12. These contentions speak to the credibility and persuasiveness, not the admissibility, of the report. The Motion to Strike should be denied in this respect.

Thirteenth, the plaintiff moves to strike testimony of Kimberly Innocent as improper character evidence under Federal Rule of Evidence 404. Dkt. 159 at 12. The plaintiff fails to identify the specific statements she seeks to strike, and the Motion to Strike should therefore be denied in respect.

Fourteenth, the plaintiff moves to strike Exhibit 1 to the Galusha declaration as hearsay. Dkt. 159 at 12. The plaintiff fails to identify which portions of the exhibit constitute hearsay, and the Motion to Strike should therefore be denied.

Finally, the plaintiff moves to strike Exhibit 1 to the declaration of Anne Erickson as hearsay and lacking foundation. Dkt. 159 at 12. This exhibit consists of a memorandum written by Janis Galusha. To the extent that the exhibit documents events that Ms. Galusha did not witness and statements made by other parties, the Motion to Strike should be granted.

#### **IV. ORDER**

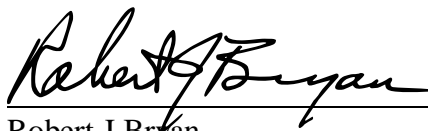
Therefore, it is hereby

**ORDERED** that the Plaintiff’s Motion for Summary Judgment on Contract Claims (Dkt. 92) is **GRANTED** only as to the bonus compensation and double damages owed to Dr. Forshey under the Associate Agreement and is otherwise **DENIED**; that Dr. Forshey is entitled to

1 judgment in the amount of \$6,295.29; that the Plaintiff's Motion for Summary Judgment on  
2 Counterclaims (Dkt. 93) is **GRANTED** as to the counterclaim for tortious interference with  
3 business expectancies and **GRANTED in part** and **DENIED in part** as to the counterclaim for  
4 breach of contract, as provided herein; and that the plaintiff's Evidentiary Motions to Strike  
5 contained in the reply (Dkt. 159) are **GRANTED** and **DENIED** as provided herein.

6 The Clerk of the Court is instructed to send uncertified copies of this Order to all counsel  
7 of record and to any party appearing pro se at said party's last known address.

8 Dated this 24th day of July, 2007.

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10 Robert J Bryan  
11 United States District Judge  
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